John Pedersen and Shirlee Pedersen d/b/a San Bernardino Dental Group, and its alter ego, William J. Simon, Trustee in Bankruptcy *and* Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166, AFL–CIO. Case 31–CA–17225

March 20, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On August 24, 1990, Administrative Law Judge William L. Schmidt issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

[1] In agreeing with the judge that William J. Simon, as the chapter 7 trustee in bankruptcy, did not violate Sec. 8(a)(5) and (1) of the Act, we emphasize the fact that the bankruptcy court did not authorize Simon to operate the San Bernardino Dental Group. In these circumstances, we find it unnecessary to decide whether, under other circumstances, a chapter 7 trustee who is given the authority by the bankruptcy court to operate a business has an obligation to bargain with a union that is the collective-bargaining representative of employees at that business.

Raymond Norton, Esq., for the General Counsel.
Maryann M. Sebelist, Administrator, of San Bernardino Dental Group, of San Bernardino, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. Teamsters, Chauffeurs, Warehousemen, Industrial and Allied Workers of America, Local 166 (Union) filed unfair labor practice charges against San Bernardino Dental Group (Respondent SBDG or SBDG) and William J. Simon, Trustee (Respondent Simon or Simon) on June 24, 1988.[1]

On August 26, the Regional Director for Region 31 of the National Labor Relations Board (NLRB or Board) issued a complaint alleging Respondents SBDG and Simon had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (Act). A hearing on the complaint was scheduled before an administrative law judge.

Simon answered the complaint on September 9; SBDG answered on September 16. Both denied that they engaged in the unfair labor practices alleged. Both alleged a variety of affirmative defenses discussed in pertinent part below.

I heard this matter on August 9, 1990, at San Bernardino, California. After the evidence was in and following oral argument by the General Counsel, I announced my intention to dismiss the complaint effective upon the filing of this written decision with the Board and summarized my rationale for this action.[2] Accordingly, I now issue the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Pleadings*

Since 1975, the complaint alleges, the Union has been the exclusive bargaining representative for an appropriate employee bargaining unit of SBDG's dental assistants, registered dental assistants, dental receptionists, finance employees and front desk employees employed at its locations in San Bernardino and Riverside, California. This unit excludes SBDG's professional employees, management personnel, guards and supervisors as defined in the Act. According to the complaint, union recognition has been embodied in a series of collective-bargaining agreements, the most recent of which is effective by its terms for the period July 1, 1984, to July 30, 1989, but that agreement was rejected by Respondent Simon subsequent to Respondents' Chapter 7 bankruptcy petition filed on or about April 10, 1987.

Additionally, that complaint alleges that Simon was designated as the Chapter 7 trustee in bankruptcy ''with full authority to continue [SBDG's] operations and to exercise all powers necessary to the administration of [SBDG's] business.''

Based on the foregoing premises, the complaint alleges that ''[c]ommencing on or about November 24, 1987, and continuing to date, and more particularly on December 16, 1987, and May 2, 1988, the Union has requested, and is requesting, Respondents to bargain collectively.'' The complaint claims Respondents violated Section 8(a)(1) and (5) of the Act because ''[c]ommencing on or about May 2, 1988, and at all times thereafter, Respondent . . . Simon did refuse, and continues to refuse, to bargain collectively with the Union . . . [as] . . . Simon has refused, and continues to refuse, to recognize or meet with the Union for the purposes of negotiating or discussing the terms of a collective-bargaining agreement.'' There is no allegation that SBDG violated the Act in any other manner.

Simon's answer alleges that he was ''appointed as the Trustee in the Chapter 7 bankruptcy estate of John Pederson, D.D.S. and Shirlee Pederson on July 23, 1987, pursuant to 11 U.S.C. Sec. 701.''[3] Simon also alleges that he ''does not have full authority to continue [SBDG's] operations and ex-

[1] Where not shown otherwise, other dates refer to the 1988 calendar year.

[2] Simon stipulated that he would abide by any order or settlement requiring that SBDG bargain with the Union as a result of this proceeding. Simon's attorney participated fully in a lengthy prehearing conference and, upon his request, was granted leave not to attend the hearing based on the stipulation.

[3] From the bankruptcy case docket, it appears that ''Pedersen'' is the correct spelling of the debtors' surname.

ercise all powers necessary to the administration of . . . [SBDG's] business.'' Simon asserts that in his capacity as the Chapter 7 Trustee, he would only have authority to operate the bankrupt estate if authorized by the Bankruptcy Court pursuant to 11 U.S.C. Sec 721 and that he had never sought, nor received, authority to do so in SBDG's instance. Simon alleges that as Trustee he:

> absolutely has no authority at all to deal with the employees of the Debtor subsequent to the filing of the bankruptcy Petition and, therefore, the Complaint of the N.L.R.B. is misplaced and the joinder of Trustee to this action is improper.

Both Simon and SBDG allege that jurisdiction of this matter properly lies with the bankruptcy court.

B. *Evidence*

Respondent SBDG is an unincorporated professional dental practice in San Bernardino, California. Prior to April 1987, SBDG also maintained a facility in Riverside, California. In the year prior to the issuance of the complaint, SBDG's direct inflow exceeded $2800 and its gross sales exceeded $250,000 annually. On that basis, I find SBDG is engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act. SBDG meets the Board's applicable discretionary standard for exercising its statutory jurisdiction.

In April 1987, John Pedersen, the dentist who owns SBDG, and his wife, Shirlee, filed a Chapter 7 petition in bankruptcy. At the same time, the SBDG facilities were closed and its 25 or so employees laid off except for a skeleton crew retained to complete work in progress.

After approximately 1 month, Pedersen reopened the San Bernardino SBDG facility using most of the same equipment (said to be leased or almost completely leveraged) and employing most of the same employees as before the closing.

In July 1987, Simon was appointed as the trustee in bankruptcy and, thereafter, appears to have set about liquidating the significant assets in the bankrupt estate for the benefit of the Pedersens' creditors. In this same period, the existing contract in effect between SBDG and the Union was set aside by the bankruptcy court. There is agreement, however, that Simon never sought, nor was granted, authorization from the bankruptcy court to continue the postbankruptcy SBDG operation.

In November and December 1987, the Union sent written communications to SBDG requesting meetings for the purpose of engaging in collective-bargaining negotiations. These requests went unanswered. At or about the same time, Union agents apparently called at the SBDG facility and made similar requests which were turned down.

By letter dated May 2, the Union's counsel requested that Simon meet with the Union for the purpose of engaging in collective bargaining negotiations on the ground that, as trustee, Simon was SBDG's alter ego for labor law purposes. By letter dated June 2, Simon responded by asserting that he had no interest in SBDG because its assets were fully secured and denying that he was SBDG's alter ego. No evidence was produced indicating that Simon ever met with Union agents to engage in negotiations concerning SBDG's employees.

In September, an employee of SBDG filed a decertification petition. That petition is blocked by this charge and complaint.

C. *Further Findings and Conclusions*

Contrary to the affirmative allegation of Respondents, the NLRB is the appropriate forum for the adjudication of unfair labor practice matters arising under the Act. *Nathanson v. NLRB*, 344 U.S. 25 (1952); *NLRB v. Brada Miller Freight System*, 16 B.R. 1002 (1981).

General Counsel concedes, contrary to his complaint allegation, that Simon was never authorized by the bankruptcy court to operate SBDG. However, General Counsel argues Simon could potentially be authorized to operate SBDG by virtue of 11 U.S.C. § 721 and, for this reason, Simon is SBDG's alter ego who had a duty to bargain with the Union upon request. I do not agree.

Simon, as the Chapter 7 trustee, is not SBDG's alter ego and, hence, did not engage in an unfair labor practice by failing or refusing to meet and bargain with the Union pursuant to its May 2 request.

Section 8(a)(5) of the Act provides in substance that it is an unfair labor practice for an ''employer'' to refuse to bargain collectively with a certified or recognized employee representative. Section 8(d) of the Act defines the term ''bargain collectively'' to include the mutual obligation of an employer and a union to ''meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.''

Section 2(1) of the Act defines the term ''person'' to include bankruptcy trustees and Section 2(2) of the Act defines the term employer to include ''any person'' acting as an agent for an employer.

Where a successor employer is found to be an alter ego ''the courts have had little difficulty holding the the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor.'' *Howard Johnson v. Detroit Joint Board*, 417 U.S. 249, 259 fn. 5 (1974). This includes the duty to bargain with the recognized employee representative pursuant to Section 8(a)(5). See *O'Neill Ltd*., 288 NLRB 1354 (1988). The conclusion that one party is the alter ego of another for purposes of determining duties and obligations under the Act is a fact question resolved by the attendant circumstances. *Crawford Door Sales Co.*, 226 NLRB 1144 (1976).

In certain cases, the Board has treated bankruptcy trustees, foreclosure trustees, and debtors-in-possession[4] as alter egos of the debtors involved. *Karsh's Bakery*, 273 NLRB 1131 (1984); *Nathan Yorke, Trustee*, 259 NLRB 819 (1981); *Jersey Juniors*, 230 NLRB 329 (1977); *Cagle's, Inc.*, 218 NLRB 603 (1975); and *Marion Simcox, Trustee*, 178 NLRB 516 (1969). These cases involved debtor reorganization situations. That element is not present here.

Reorganization is a special feature of present bankruptcy law. ''Ordinary bankruptcy aims at liquidation of a business. Reorganization . . . aims at a continuation of the old business.'' *Baker v. Gold Seal Liquors*, 417 U.S. 467, 471 fn. 3 (1974). These distinctive approaches appear in the Bankruptcy Act at 11 U.S.C. § 701 et seq., and 11 U.S.C. § 1101

[4] With minor exceptions, a debtor-in-possession has the same rights, powers, functions and duties as a trustee. See 11 U.S.C. § 1107.

et seq. As a Chapter 7 proceeding, the underlying bankruptcy matter, by definition, looks to the liquidation of the Pedersens' estate.

Trustee authority differs in Chapter 7 and Chapter 11 proceedings. A Chapter 11 trustee, if named, ''may operate the Debtor's business'' unless the bankruptcy court orders otherwise at the request of a ''party in interest'' following due notice and a hearing. 11 U.S.C. § 1108. As the Chapter 11 proceeding ''aims at a continuation of the old business,'' a well grounded basis exists to conclude that the trustee is the debtor's alter ego.

By contrast, a liquidation trustee—such as Simon—is not chartered automatically by statute to operate the debtor's business. 11 U.S.C. § 721 states:

> The Court may authorize the Trustee to operate the business of the Debtor for a limited period, if such operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

Consistent with this provision, 11 U.S.C. § 704(8) provides that the liquidation trustee must file periodic reports with the bankruptcy court ''if the business of the debtor is authorized to be operated.''

The Historical and Revision Note accompanying 11 U.S.C. § 721—based on Senate Report No. 95–989—indicates by way of example that it would be appropriate for a bankruptcy court to authorize a trustee to operate a watchmaker's business to assemble watches from existing parts if completed watches are far more valuable than the unassembled parts.

Although a Chapter 7 trustee may undertake to reject a collective-bargaining agreement as a part of his general powers to reject executory contracts, this power is unrelated to the debtor's statutory duty to bargain under the Act. See generally, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). Without operating authorization, Chapter 7 trustees lack the essential agency character concerning the debtor's postpetition operation. I find, therefore, that even though Simon is the Chapter 7 trustee with respect to the Pedersens' bankruptcy matter, he is not an employer within the meaning of Section 2(2) because he has not been authorized to operate SBDG.

By engaging in bargaining concerning SBDG's postpetition operation without the Court's authorization, Simon arguably would be engaged in an ultra vires exercise wasteful of the bankrupt estate he was empowered to oversee for the benefit of the Pedersens' creditors. Adopting the General Counsel's theory suggests by analogy that, in ordinary arms length successorship situations, a potential successor could be compelled to bargain with the employee representative of a business not yet acquired. Although such bargaining may be permissible, compelling potential successors to do so is neither warranted nor legally supportable.

Practically speaking, it is unlikely that Simon will be authorized to operate SBDG. As a professional dental practice SBDG's current income is likely derived in the main from the personal services of Dr. Pedersen and his dental associates. Any postpetition income derived from the personal services of the debtor is exempt from the bankruptcy estate. 11 U.S.C. § 541(a)(6). To the extent that Dr. Pedersen is still using equipment properly includable in the bankrupt estate, Simon has full authority to take control of such assets without authority to operate SBDG. 11 U.S.C. § 704(1).

The two principal cases offered to support General Counsel's position, *Institute of Technical Careers*, 279 NLRB 811 (1986), and *Ohio Container Service*, 277 NLRB 305 (1984), are inapposite. In those cases the debtors committed the underlying unfair labor practices but the Board extended its remedial order to include the Chapter 7 trustees pursuant to Section 10(c) of the Act. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973). Here the General Counsel alleged the Chapter 7 trustee was the perpetrator of the unfair labor practice and, hence, had the burden of proving the essential elements of his case. General Counsel failed to carry that burden.

Because Simon, in his capacity as the Chapter 7 trustee, does not have authority to operate SBDG and is not SBDG's alter ego as claimed by General Counsel, I find that he had no duty to bargain with the Union pursuant to its May 2 request and that he did not violate the Act by failing or refusing to do so. No finding is made concerning SBDG's failure to bargain with the Union pursuant to the November and December 1987 requests as no allegation is made that SBDG violated the Act independent of Simon's conduct.

CONCLUSIONS OF LAW

1. Respondent SBDG is an employer engaged in commerce or a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Simon, trustee in bankruptcy, is not an employer within the meaning of Section 2(2) of the Act and is not the alter ego of Respondent SBDG.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. The General Counsel has failed to prove that Respondent Simon, trustee in bankruptcy, violated the Act as alleged in the complaint.

Based on the entire record, and on the foregoing findings of fact and conclusions of law, I issue the following recommended[5]

ORDER

The complaint is dismissed.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.